

82-2029

Office - Supreme Court, U.S.

FILED

No. _____

JUN 10 1983

STEVAS.

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

PAUL RICHARD ASHE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

OSCAR B. GOODMAN
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

*Attorney of Record for Petitioner:
PAUL RICHARD ASHE*

(i)

QUESTIONS PRESENTED FOR REVIEW

1. Did Petitioner's conviction and sentence, despite uncontradicted evidence he was a pathological gambler, deny him the defense of insanity in violation of the Due Process Clause?
2. Was the Petitioner subjected to cruel and unusual punishment because of his status as a pathological gambler?

TABLE OF CONTENTS

| | <i>Page</i> |
|---------------------------------------|-------------|
| QUESTIONS PRESENTED FOR REVIEW..... | i |
| PARTIES TO PROCEEDING..... | 1 |
| OFFICIAL AND UNOFFICIAL REPORTS..... | 1 |
| JURISDICTIONAL STATEMENT | 1 |
| STAY OF MANDATE..... | 2 |
| CONSTITUTIONAL PROVISION INVOKED..... | 2 |
| STATEMENT OF THE CASE | 2-7 |
| ARGUMENT FOR WRIT | 7 |
| CONCLUSION | 10 |
| APPENDIX A | 1a |
| APPENDIX B..... | 1b |

TABLE OF AUTHORITIES

| <i>Cases:</i> | <i>Page</i> |
|--|-------------|
| <i>Jackson vs. Virginia,</i> 443 US 307, 61 LEd2d 580, 99 SCt 2781 (1979)..... | 8 |
| <i>Robinson vs. California,</i> 370 US 660, 660 8 LEd2d 758, 82 SCt 1417 (1962)... | 9,2a |
| <i>United States vs. Allard,</i> 600 F.2d 1301, 1305 (9th Cir. 1979)..... | 3a |
| <i>United States vs. Choate,</i> 576 F.2d 165, 186 (9th Cir.), cert. denied, 439 U.S. 953 (1978)..... | 3a |
| <i>United States vs. Cooper,</i> 465 F.2d 451, 453 (9th Cir. 1972) | 8 |
| <i>United States vs. Gilliss,</i> 645 F.2d 1269, 1277 (8th Cir. 1981)..... | 9 |
| <i>United States vs. Henderson,</i> 680 F.2d 659 (9th Cir. 1982)..... | 8 |
| <i>United States vs. Humphries,</i> 636 F.2d 1172, 1180 (9th Cir. 1980), cert. denied, 451 U.S. 988 (1981) | 3a |
| <i>United States vs. Lewellyn,</i> USDC S.D. Iowa, August 17, 1982 | 9 |
| <i>United States vs. Lopez-Gonzalez,</i> 688 F.2d, 1275, 1276 (9th Cir. 1982) | 2a |
| <i>United States vs. Ortiz,</i> 488 F.2d 175, 178 (9th Cir. 1973) | 2a |
| <i>United States vs. Rojas,</i> 554 F.2d 938, 943 n. 12 (9th Cir. 1978)..... | 8 |
| <i>Wade vs. United States,</i> 426 F.2d 64, 70-72 (9th Cir., 1979 en banc) | 8 |
| <i>Wong Sun vs. United States,</i> 371 U.S. 471, 487 (1963)..... | 3a |

Statutes

| | |
|-----------------------|---|
| 18 USC §1343 | 1 |
| 18 USC §2314 | 1 |
| 28 USC §1254(1) | 1 |
| 28 USC §1291 | 1 |

Other Authorities:

| | |
|--|---------|
| <i>Diagnostic and Statistical Manual of Mental Disorders</i> | 4,6,7,9 |
|--|---------|

(v)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

No. _____

PAUL RICHARD ASHE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

1

PAUL RICHARD ASHE petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

PARTIES TO PROCEEDING

This proceeding originated in a criminal prosecution in the United States District Court for the District of Nevada wherein the United States of America was plaintiff and **PAUL RICHARD ASHE** was the sole defendant.

OFFICIAL AND UNOFFICIAL REPORTS

The disposition of the appeal in the United States Court of Appeals for the Ninth Circuit was by an unpublished memorandum panel opinion filed and entered on April 18, 1983. A copy of the memorandum opinion is reproduced as Appendix "A" hereto.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Nevada was founded on a federal grand jury indictment charging Petitioner with five counts of wire fraud in violation of 18 USC §1343 and interstate transportation of false and forged securities under 18 USC §2314.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was founded on Petitioner's timely appeal from his conviction pursuant to 28 USC §1291.

Jurisdiction of this Honorable Court is invoked under 28 USC §1254(1).

STAY OF MANDATE

Petitioner did not file a motion for rehearing in the United States Court of Appeals for the Ninth Circuit.

An order on motion for stay of mandate was filed in the Court of Appeals on May 12, 1983, staying the mandate until the filing of this Petition on or before June 11, 1983, with provision that the stay would be continued in effect pending final disposition of this case by this Honorable Court. A copy of this order of stay is reproduced as Appendix "B" hereto.

CONSTITUTIONAL PROVISION INVOKED

Amendment V of the United States Constitution provides, as pertinent:

"No person shall be . . . deprived of life, liberty or property, without due process of law."

Amendment VIII of the United States Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

The conviction of Petitioner [hereinafter Defendant] was related to credit transactions at Las Vegas casinos and the use of bank checks to pay gambling debts, which checks were signed by the Defendant's stepfather, Saul Shuster, during his lifetime, and drawn on the Florida bank account of Saul

Shuster. The evidence supporting the indictment, viewed most favorably to Respondent [hereafter Government] is set out below.¹

Before trial Defendant moved to suppress evidence deemed to be the product of an illegal search and seizure. Issue was raised on the appeal to the Ninth Circuit about the denial of the motion to suppress, and the denial of that motion was upheld by the Court of Appeals. The Defendant does not concede that the Court of Appeals correctly resolved this issue, but Defendant does not believe that the search and seizure issue involves sufficiently flagrant conduct, or a sufficiently unique Fourth Amendment analysis, to serve,

¹The Defendant represented himself to be "Saul Shuster." At the relevant time, Saul Shuster, who was the Defendant's stepfather, was dead; however, a joint bank account in the names of Saul Shuster and Lena Shuster (Defendant's mother) continued to exist in a Florida bank.

Defendant listed the Florida bank account as a credit reference. Phone calls to the bank for credit information were the subject of two counts of wire fraud in the indictment. Checks transported to the bank in interstate commerce were the subject of three counts of the indictment.

Beginning about the end of January, 1976, Defendant began to make fairly regular trips from his home in Florida to Las Vegas where he obtained relatively low initial credit approval, but with a record of cash payments which "zeroed" out his casino credit balances, and his record of being a "high stakes" gambler, Defendant was able to substantially enlarge his credit limits until the early part of July, 1976.

On July 2, 1976, Defendant gave checks in payment of his casino credit balances (\$14,000 to MGM Grand Hotel Casino; \$25,000 to Hilton Hotel Casino; and \$15,000 to Sahara Hotel Casino), which checks bore the signature "Saul Shuster" and were drawn on the Florida bank account. These checks were accepted in payment of Defendant's casino credit balances and he received further extensions of credit in the form of gambling chips from the casinos.

On July 2, 1976, and thereafter, the Florida bank account did not contain sufficient funds to pay the three "Saul Shuster" checks; the bank account was closed July 12, 1976, by Lena Shuster while the "Saul Shuster" checks were still outstanding.

standing alone, as a compelling necessity for a grant of certiorari.

Defendant *does* seek certiorari because: (a) the expert testimony was without conflict that he suffered from the syndrome of diagnostic criteria for pathological gambling adopted by the American Psychiatric Association and published in January, 1980, in the Third Edition of *Diagnostic and Statistical Manual of Mental Disorders*, set out below;² (b) the trial court was of the erroneous view that he had no power to grant a judgment of acquittal for failure of the Government to prove beyond a reasonable doubt that the defendant was sane at the time of the commission of the acts charged in the indictment;³ and (c) sentence was imposed on

²Diagnostic criteria for Pathological Gambling

- A. The individual is chronically and progressively unable to resist impulses to gamble.
- B. Gambling compromises, disrupts, or damages family, personal, and vocational pursuits, as indicated by at least three of the following:
 - (1) arrest for forgery, fraud, embezzlement, or income tax evasion due to attempts to obtain money for gambling;
 - (2) default on debts or other financial responsibilities;
 - (3) disrupted family or spouse relationship due to gambling;
 - (4) borrowing of money from illegal sources (loan sharks);
 - (5) inability to account for loss of money or to produce evidence of winning money, if this is claimed;
 - (6) loss of work due to absenteeism in order to pursue gambling activity;
 - (7) necessity for another person to provide money to relieve a desperate financial situation.
- C. The gambling is not due to Antisocial Personality Disorder.

'THE COURT: The only trouble with [the motion for acquittal] . . . is that once the government proves their case beyond a reasonable doubt then a jury must take step two and that is determine whether or not [the Defendant] could conform his conduct to the requirements of the law.

As I understand the law . . . that burden is yours by a preponderance of the evidence. Since it's your burden from a preponderance of the evidence it becomes a jury question whether or not you have met your burden. So your motion is denied . . .

Defendant specifically as punishment for his status as a compulsive gambler.⁴ The combined effect was to deny the defense of insanity to the Defendant and to impose cruel and unusual punishment upon him.⁵

At trial Defendant offered the testimony of two highly qualified experts in the field.⁶ After examination and testing

*The trial court ruled at sentencing:

Through the years I have seen many people for whom I cared and had great respect for, absolutely ruined by a compulsive urge to gamble. I do know—I don't need a psychiatrist to tell me—I do know there are compulsive gamblers. Just as surely as I know there are compulsive gamblers, I know you are one.

If I place you on probation, you will go back, not to your law practice because you will lose your license anyway in my opinion, but you will, in all probability, pick up your professional life as a certified public accountant, and you will do all right in your profession. But you will not stop gambling. I feel about compulsive gamblers as I do about alcoholics. You have to hit the very bottom before you can rise back up to the top.

I reconcile this matter in my own mind this way: If I sentence you to imprisonment for a term of three years, you are going to do approximately 12 to 14 months. I think in that period of time, if you continue to seek treatment within the institution, it will be the answer for you. If I put you out on probation, you may make a year of probation, but as sure as I sit here I don't feel you will make two. You will be back to gambling again.

I think the worst things a Judge can say to a man is, "I am doing this for your own benefit," but this is one sentence in my own mind I feel that you are going to benefit, however terrible the consequences.

'Defendant's motions for acquittal at the close of all the evidence and after the verdict were denied. Defendant was sentenced to a \$10,000 fine on one count and three years' imprisonment on each of the counts with the sentences under counts two through five to run concurrently with the sentence on count one.

⁴Dr. Robert Custer was a psychiatrist specializing in alcoholism, drug abuse and pathologic gambling. Dr. Custer was associated with the Veterans Administration in Washington, D.C., responsible for national administration of treatment for pathologic gambling, was a member of

of Defendant, both doctors testified that the Defendant suffered from the syndrome of pathological gambling, in its most severe form. While the Defendant may have had the capacity to perceive the difference between right and wrong, the Defendant, by reason of his disease was unable to conform his conduct to the requirements of the law as a result of the disease.

Dr. Custer described the history of the Defendant as having been extremely industrious and diligent in his youth, who by his efforts, working while he also went to school, who became an accountant and eventually an attorney. At about age 18 Defendant made small (\$20) bets on dog races. Over the next ten years his gambling escalated until he was betting in the \$1000's. The effect was to disrupt his marriage and end in divorce, as well as loss of a business. Defendant was involved in gambling in the Bahamas, and then began to gamble in Las Vegas, with the amount of his betting (and his losses) increasing all the time. At one point Defendant's stepfather, concerned about Defendant's gambling debts, gave him some signed checks to use to pay off the losses, then shortly thereafter the stepfather died from a heart ailment.

the task force of the American Psychiatric Society which promulgated the diagnostic criteria for pathological Gambling for the *Diagnostic and Statistical Manual of Mental Disorders*, the standard criteria used by psychiatrists and psychologists in the country, was medical advisor to the National Council on Compulsive Gambling and for the Johns Hopkins Treatment Program for Compulsive Gambling, as well as being a nationally known lecturer and author in the field.

Dr. Jule Wayne Moravec held a doctorate in clinical psychology, worked for the Veterans Administration in Washington, D.C. [but independently of Dr. Custer], and was also in private practice. Dr. Moravec's qualifications included membership on the advisory board of the National Council for Pathological Gambling, staff consultant at the Johns Hopkins Compulsive Gambling Treatment Center, and associate professor at University of Miami Medical School.

[Three of those checks were eventually used by Defendant to pay his Las Vegas debts.] The Defendant did not have an antisocial personality, but he had an uncontrollable compulsion to gamble. If a policeman had been at Defendant's side, watching his every move, Defendant would have passed the stepfather's checks and probably have tried to borrow money from the policeman because Defendant had to have money to gamble.

Government relied on the testimony of the psychiatrist Dr. William D. O'Gorman, a qualified, practicing psychiatrist in Las Vegas. After examining and testing Defendant Dr. O'Gorman concluded that Defendant had the syndrome of pathological gambling in accordance with the criteria of the *Diagnostic and Statistical Manual of Mental Disorders*, but Dr. O'Gorman viewed pathological gambling as a result of bad habits and not a disease. Dr. O'Gorman's opinion was that the Defendant in performing the acts charged in the indictment had no intention to commit any crime or defraud anybody. Nevertheless, expressed the equivocal and conditional opinion that the Defendant could have conformed his conduct with the law if the defendant had the will to stop gambling, but he didn't.

The Court of Appeals ruled that the testimony of Dr. O'Gorman was sufficient to support the verdict, and that in rejecting probation the trial court had merely determined that Defendant's gambling history made him a poor probation risk.

ARGUMENT FOR WRIT

1. The test for the defense of insanity is whether a person, as a result of a mental disease or defect, lacks substantial

capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. *Wade v. United States*, 426 F2d 64, 70-72 (9th Cir., 1970, *en banc*). When the defendant introduces expert testimony that is sufficient to support a finding of insanity, Government must overcome defendant's expert evidence in some manner *and* present enough affirmative evidence of defendant's sanity at the time of the alleged offense to prove defendant was sane beyond a reasonable doubt. *United States v. Cooper*, 465 F2d 451, 453 (9th Cir. 1972). *United States v. Henderson*, 680 F2d 659 (9th Cir. 1982) reversed the conviction of an alcoholic who had caused a disturbance on an airplane for the lack of evidence that at the pertinent time the defendant had the ability voluntarily to control his drinking.⁷ The reversal was under the standard of *Jackson v. Virginia*, 443 US 307, 61 LEd2d 580, 99 SCt 2781 (1979), which enunciates the same test to be used in passing on a motion for a judgment of acquittal. *United States v. Rojas*, 554 F2d 938, 943 n.12 (9th Cir. 1978).

The decision of the Court of Appeals is in contravention of *Jackson v. Virginia*, *supra*, and the Due Process Clause of the Fifth Amendment of the United States Constitution.

2. The Court of Appeals upheld Defendant's sentence on the basis that he was determined to be a poor probation risk. This is use of the purest tautology. The only reason Defendant was deemed to be a "poor probation risk" was *because* he was, and was expressly found by the trial court to be, a pathological gambler. The sentence, and its anticipated execution, were intended to be in the nature of a shock treatment, causing Defendant to "hit the very bottom" so he could "rise back up to the top." Sentence was imposed for the

⁷Government also relied on Dr. O'Gorman in *Henderson*.

"benefit" of Defendant "however terrible the consequences." This is cruel and unusual punishment inflicted expressly because the Defendant was a compulsive or pathological gambler, in violation of the Eighth Amendment of the United States Constitution. *Robinson v. California*, 370 US 660, 660, 8 LEd2d 758 82 SCt 1417 (1962). Please see also the special concurrence of Justice Douglas at 370 US, 668-670.

3. There is a conflict of authority about the status of pathological or compulsive gambling as a mental disease and defect for the purposes of the defense of insanity. *United States v. Gilliss*, 645 F2d 1269, 1277 (8th Cir. 1981) recognized the status as a defense, but at the same time held that testimony of an expert that he did not consider this "impulsive disorder" to constitute a "mental disease or defect" was sufficient to sustain the defendant's conviction for theft of an auto and kidnapping of its owner as his response to a gambling related crisis. *United States v. Lewellyn*, USDC S.D. Iowa, August 17, 1982, released December 3, 1982, not yet officially reported but described and extensively digested at 32 CrL 2215, held that although pathological gambling is a "mental disorder" in the standard diagnostic volume for mental health clinicians (*Diagnostic and Statistical Manual of Mental Disorders*, Third Ed., supra), the condition is not a "mental disease or defect" within the meaning of the federal insanity defense.

In the instant case, the trial and appellate courts admitted the condition as within the federal insanity defense, but like *Gillis*, relied on testimony that the condition was not a "mental disease or defect" [just a bad habit, according to Dr. O'Gorman].

So, also, the trial judge obviously knew that the Government has failed to rebut the Defendant's proof of his

condition, but nevertheless sentenced him to a fine and imprisonment *because* the Defendant was a pathological gambler.

4. The law stands in grave need of clarification, not only because of the internal tension of the decisions on the issues, and the divergence of views even within a single circuit between the Court of Appeals and one of its District Courts, but also because the emergence of legalized gambling as a national industry for purposes of tax revenue and tourism has and will in the future greatly enlarge the exposure of persons to conditions which will nourish latent or incipient compulsive gambling.

The Court may take judicial notice of the gaming industries of New Jersey and Nevada. Lotteries are lawful in many states (e.g. New York, Arizona). Some form of legalized gambling exists in most of the states (e.g., California poker parlors and multi-state pari-mutuel race courses).

CONCLUSION

For all of the foregoing reasons, the grant of this petition for certiorari is necessary.

Respectfully submitted:

OSCAR B. GOODMAN
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner:
PAUL RICHARD ASHE

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
) No. 82-1451
Plaintiff/Appellee,)
) USDC No. CR
) CR 80-125-1-HEC
vs.)
)
PAUL RICHARD ASHE,)
)
Defendant/Appellant.)
)

MEMORANDUM

On Appeal from the United States District Court
for the District of Nevada
Hon. Harry E. Claiborne, Presiding

Argued and Submitted: February 16, 1983

Before: MERRILL, CHOY and ALARCON, Circuit
Judges

1. The testimony of Dr. O'Gorman to the effect that Appellant was not suffering from any mental disease or defect and that he was able to conform his conduct to the requirements of law was sufficient to support the verdict. A jury may properly weigh the conflicting testimony of psychiatrists and

resolve that conflict. *United States v. Ortiz*, 488 F.2d 175, 178 (9th Cir. 1973).

2. In sentencing Appellant to incarceration in a penal institution, the District Court did not make criminal his status of compulsive gambler contrary to the holding in *Robinson v. California*, 370 U.S. 660 (1962). In rejecting the alternative or probation, the Court did no more than determine that Appellant's gambling history rendered him a poor probation risk. This was not an abuse of discretion. Moreover, sentence imposed was well within the statutory limit, and thus is not subject to review on appeal. See, e.g., *United States v. Lopez-Gonzalez*, 688 F.2d 1275, 1276 (9th Cir. 1982).

3. The illegal search of Appellant's room by hotel security personnel on December 16, 1977, and the subsequent suppression of items there seized did not taint the subsequent FBI investigation which led to the present charges. Appellant contends that he admitted his identity as the alleged forger, Paul Allen, only after being confronted with the unlawfully seized items. He contends that his confession resulted in the FBI undertaking the investigation resulting in the present charges and that that investigation would not otherwise have been undertaken.

We reject this contention. The present charges were based on offenses committed by Appellant under the assumed name of his deceased stepfather, Saul Shuster, and the FBI had independent cause for interest in the activities of "Saul Shuster". An earlier "Saul Shuster" forging investigation had been undertaken by the FBI but was closed after restitution was made. On December 12, 1977, Agent Smith of the Las Vegas, Nevada, FBI office had received information from the Miami, Florida, FBI office that "Saul Shuster" was believed to be Appellant and that he was believed to be engaged in fraudulent activities in Las Vegas. Before Agent Smith was

able to act on this information, the Nevada Gaming Control Board informed Smith (apparently on the basis of the "Paul Allen" affair) that the Board suspected that Appellant was involved in a scheme to defraud several Las Vegas casinos.

Suppression is inappropriate where the government has been led to the evidence in question by an independent source. *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); see *United States v. Allard*, 600 F.2d 1301, 1305 (9th Cir. 1979). In this case Agent Smith testified that he decided to reopen the investigation of Appellant because of the combined effect of receiving evidence of Appellant's identity from the two different sources. At the time of the illegal search Agent Smith already had information that Appellant was "Saul Shuster". Appellant was indicted and convicted only on the Ashe-Shuster fraud counts. The most that can be said is that Smith's decision to reopen the investigation of Appellant was encouraged by the information provided by the Nevada Gaming Control Board. Illegally seized evidence which merely causes law enforcement officers to intensify an investigation does not warrant suppression. *Allard*, 600 F.2d at 1305; *United States v. Choate*, 576 F.2d 165, 186 (9th Cir.), cert. denied, 439 U.S. 953 (1978). In *United States v. Humphries*, 636 F.2d 1172, 1180 (9th Cir. 1980), cert. denied, 451 U.S. 988 (1981), we allowed the introduction of evidence gained from the surveillance of a house of a defendant; the house to be surveyed was identified from a combination of evidence, some gained from an illegal arrest and some gained from independent sources. Under the "intensification" cases and *Humphries*, the reopening of the investigation in this case was proper.

JUDGMENT AFFIRMED.

APPENDIX "B"

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

No. 82-1451
CV 80-0125-01
HEC

PAUL RICHARD ASHE,

Defendant/Appellant.

**ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41 (b) Fed.R.App.P.)**

Upon due consideration of appellant motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before June 11, 1983.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby GRANTED.*

/s/ MERRILL
United States Circuit Judge

*In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

CA9-003 (12/3/79)